

Decision of the European Ombudsman on complaint 487/2003/MF against the European Commission

Decision

Case 487/2003/MF - Opened on 23/04/2003 - Decision on 29/03/2004

Strasbourg, 29 March 2004

Dear Mr H.,

On 4 March 2003, you made a complaint to the European Ombudsman concerning your disqualification from competition COM/A/6/01.

On 23 April 2003, I forwarded the complaint to the President of the European Commission. The European Commission sent its opinion on 6 June 2003 and I forwarded it to you with an invitation to make observations, if you so wished, by 31 July 2003 at the latest. No observations appear to have been received from you.

I am writing now to let you know the results of the inquiries that have been made.

I apologise for the length of time it has taken to deal with your complaint.

THE COMPLAINT

According to the complainant, the relevant facts are as follows:

The complainant worked for the Delegation of the European Commission in Bangladesh. On 18 May 2001, he sent his application to participate in competition COM/A/6/01 organised by the European Commission to constitute a reserve of administrators in the fields of external relations and management of aid to non-member countries and published in OJ C/110 A/16 of 11 April 2001.

Section III of the notice of competition stated that candidates had to be born after 25 May 1955. The complainant was born on 10 July 1953. However, Annex I (1) of the notice of competition stated that the age limit did not apply *"to applicants who have been serving continuously as officials or other servants of the European Communities for more than one year."*

The complainant was informed that he had passed the pre-selection tests on 17 December



2001 and the written tests on 7 May 2002. He was then invited to participate in the oral examination on 1 July 2002.

On 9 July 2002, DG Personnel and Administration of the Commission informed the complainant that, following his description of his work experience during the oral examination, the Selection Board had had to review his situation. Given that the Selection Board had found that he was not a local agent in the sense of the Staff Regulations, the Commission informed him that the exemption from the age limit set out in Annex I (1) of the notice of competition did not apply to him. It also informed him that he was disqualified in accordance with Section IV 7 of the notice which stated that if, at any stage in the procedure, the Selection Board found that the information in the application form was incorrect or did not tally with the supporting documents, the candidate will be disqualified. Concerning the use of age limits, the Commission informed the complainant that it had decided not to use them anymore in competitions published in the future.

On 31 July 2002, the complainant wrote to the Commission alleging that the elimination of his application on the grounds that he was not a local agent was unfair. In a letter dated 13 September 2002, the Commission replied that given that the complainant had been employed as a consultant, he could not be considered as an agent of the European Communities. On 7 October 2002, the complainant made an appeal against the decision of the Selection Board under the Article 90 (2) procedure. By the time the complaint to the European Ombudsman was lodged, the European Commission had not yet replied to the complaint made under Article 90 (2) of the Staff Regulations.

On 4 March 2003, the complainant lodged a complaint with the European Ombudsman. He alleged that the European Commission had failed to consider him as an agent of the European Communities, depriving him of the exemption from the age limit. The complainant further alleged that he was victim of discrimination due to the use of an age limit in the notice of competition.

On 15 May 2003, the complainant informed the European Ombudsman that he had received the reply of the Commission to his complaint made under Article 90 (2) and enclosed a copy of it.

THE INQUIRY

The opinion of the European Commission

The opinion of the European Commission on the complaint was in summary as follows:

Concerning the alleged failure to reply to the complaint made under Article 90(2) of the Staff Regulations, the complainant had received a negative reply signed on 13 March 2003.

The complainant had been recruited as a technical assistant posted as "NGO Adviser" under the food security programme in Bangladesh.

The contract of employment of the complainant had been concluded by the Commission on 21



May 1999 for a fixed period amounting to thirty-six months.

Article 5 of the contract of employment clearly stated that the contract was governed by Belgian law and that, *"despite his contractual relation with the Commission, the contracting party will not be able to benefit from the social security scheme as foreseen in the Staff Regulations or in the Conditions of employment of other servants; he will not be able to ask for the benefit of the Convention of Vienna on Diplomatic Relations, unless special arrangement made by the Commission, nor the application of Article 13 of the Protocol on Privileges and Immunities of the European Communities"*. It was therefore clear that the contract of employment concluded between the complainant and the Commission was not a "local staff" contract as defined in Article 4 of the "Conditions of employment of other servants of the European Communities". The nature of the contract of employment of the complainant did not enable him to benefit from the exemption from age limit provided for in Annex I (1) of the notice of competition.

The possibility of concluding contracts under private law for fixed periods was appropriate in the framework of various programmes, namely in the food security field. The complainant had been recruited under such a contract of employment. Therefore, he was not entitled to claim the benefit of exemptions foreseen to be applied in the context of contracts of a different nature.

Concerning the allegation of discrimination due to the use of an age limit in the notice of competition, it had to be pointed out that the Commission had decided to abolish age limits in competitions published from 10 April 2002. In its reply to the complaint made under Article 90(2) of the Staff Regulations, the Commission stated that the age limit set by itself in the notices of competitions aimed to create career prospects for officials and to ensure that officials work for a minimum period in order to acquire the pension rights set out in the Staff Regulations. These grounds constituted a reasonable and objective basis for the age limit set by the Commission and pursued a legitimate aim.

The decision of the Commission to abolish age limits in competitions published from 10 April 2002 clearly applied only to competitions held after that date and could not have retroactive effect in relation to competitions which had already been published.

The complainant's observations

No observations appear to have been received from the complainant.

THE DECISION

1 The alleged failure of the European Commission to consider the complainant as an agent of the European Communities, depriving him of the exemption from the age limit

1.1 The complainant worked for the Delegation of the European Commission in Bangladesh. In 2001, he applied to participate in competition COM/A/6/01 organised by the European Commission to constitute a reserve of administrators in the fields of external relations and management of aid to non-member countries. Section III of the notice of competition stated that candidates had to be born after 25 May 1955. The complainant was born on 10 July 1953. However, Annex I (1) of the notice of competition stated that the age limit did not apply *"to applicants who have been serving continuously as officials or other servants of the European*



Communities for more than one year." The complainant alleged that the European Commission had failed to consider him as an agent of the European Communities, depriving him of the exemption from the age limit.

1.2 The European Commission stated that the complainant had been recruited as a technical assistant posted as "NGO Adviser" under the food security programme in Bangladesh. The contract of employment concluded between the complainant and the Commission was not a "local staff" contract as defined in Article 4 of the "Conditions of employment of other servants". The nature of the contract of employment of the complainant did not enable him to benefit from the age limit provided for in Annex I (1) of the notice of competition.

1.3 The European Ombudsman notes that, following the terms of his contract of employment, the complainant was recruited as a technical assistant posted as "NGO Adviser" and the contract was governed by Belgian law.

1.4 In these circumstances, the Ombudsman considers that the evidence in his possession does not allow him to conclude that the complainant was a member of the "local staff" within the meaning of Article 4 of the "Conditions of employment of other servants". The Ombudsman therefore takes the view that the decision of the European Commission to consider the complainant ineligible for the derogation concerning the age limit appears to be reasonable.

1.5 From the above, the European Ombudsman concludes that there appears to have been no maladministration by the European Commission as regards this aspect of the case.

2 The alleged discrimination due to the use of an age limit in the notice of competition.

2.1 Section III of the notice of competition stated that candidates had to be born after 25 May 1955. The complainant alleged that he was victim of discrimination due to this use of an age limit in the notice of competition.

2.2 The European Commission stated that it had decided to abolish age limits in competitions published from 10 April 2002. As far as the situation before 10 April 2002 was concerned, the Commission put forward that the age limit set by itself in the notices of competitions aimed to create career prospects for officials and to ensure that officials work for a minimum period in order to acquire the pension rights set out in the Staff Regulations. In the Commission's view, these grounds constituted a reasonable and objective basis for the age limit set by the Commission and pursued a legitimate aim.

2.3 The European Ombudsman has already had to deal with this in his own initiative inquiry on age limits (ref.: OI/2001/(BB) OV). In the course of this inquiry, the Commission accepted to abolish age limits as from 10 April 2002 (1). In the decision following this inquiry on age limits, the European Ombudsman concluded that *"there appears to have been no maladministration by the institutions and bodies mentioned in paragraph 1.8 of the decision"* (the European Parliament and the European Commission). The competition for which the complainant applied was published before 10 April 2002. The European Ombudsman therefore concludes that no further inquiries into this aspect of the complaint are justified.

3 Conclusion



On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission as regards the alleged failure of the European Commission to consider the complainant as an agent of the European Communities. As regards the alleged discrimination due to the use of an age limit in the notice of competition, the European Ombudsman considers that no further inquiries are justified. The Ombudsman therefore closes the case.

The President of the European Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) See :decision of the European Ombudsman in the own initiative inquiry OI/2/2001/(BB)OV-
<http://www.ombudsman.europa.eu/decision/en/01oi2.htm> [Link]